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No. 73-316

# In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B)[1] is reported at 479 F. 2d 139. The opinion of the Federal Trade Commission (Pet. App. C) is not officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 21, 1973. The petition for a writ of certiorari

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App." refers to the joint appendix in the court of appeals.

was filed on August 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an association of sellers of apparel, which is dominated by independent contractor-salesmen and which conducts collective wholesaling operations for the benefit of its members in direct competition with manufacturers who use other methods of wholesaling apparel, is exempt from Section 5 of the Federal Trade Commission Act under the labor exemption to the antitrust laws.

## STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45; Section 2(5) of the National Labor Relations Act, 49 Stat. 450, as amended, 29 U.S.C. 152(5); Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738, 15 U.S.C. 17, 29 U.S.C. 52; and Sections 2, 4, 5 and 13 of the Norris-LaGuardia Act, 47 Stat. 70, 71, 73, 29 U.S.C. 102, 104, 105 and 113, are set forth in pertinent part as Pet. App. E.

## STATEMENT

Petitioners seek review of a decision of the court of appeals (Pet. App. 1b–17b) affirming a decision of the Federal Trade Commission (Commission) (Pet. App. 1c–18c) that the National Association of Women's and Children's Apparel Salesmen, Inc. (the "Association") had restrained trade in the sale of women's and children's apparel and accessories, in violation of Section 5 of the Federal Trade Commission Act.

## THE INDUSTRY

Centered in New York City, the women's and children's apparel industry is comprised of approximately 10,000 manufacturers. Although five firms have annual gross sales in excess of 100 million dollars, ninety percent of the manufacturers in the industy have annual gross sales of one million dollars or less (Pet. App. 3c). The industry distributes through several channels. Manufacturers may sell directly to wholesalers in company-owned sales rooms or through resident salesmen who are usually compensated on a straight salary basis. Additionally, apparel is sold by traveling salesmen who may represent one or more manufacturers. Some are paid a salary and commission. Others work on a straight commission basis. These traveling salesmen generally belong to one or more affiliates of the Association—an organization which conducts trade shows throughout the country at which goods are wholesaled (*Ibid.*).

## THE ASSOCIATION

The Association is a corporation comprised primarily of wholesale clothing salesmen, affiliated organizations, groups of salesmen, and some members of management (App. 58–60). The Association has a large number of affiliated organizations that put on trade shows and a few that do not. Members of affiliated organizations are required to be members of the

Association.[2] In 1970, the Association had approximately 13,000 individual members, and 65 affiliated organizations. These affiliated organizations conduct nearly 300 trade shows annually in various places throughout the United States. Association-operated trade shows generate $3.5 to $4.5 billion dollars of annual ready-to-wear sales (Pet. App. 5c).

## PROCEEDINGS BELOW

The Commission issued a complaint on July 11, 1966 (App. 1–10) alleging that petitioners were engaged in unfair methods of competition and unfair acts and practices in commerce in connection with the promotion, offering for sale, sale, and distribution of women's and children's apparel and accessories. The complaint alleged that petitioners, by means of agreements and understandings, combined and conspired among themselves and with others to restrain and eliminate competition in the offering for sale, sale, and distribution of such products (App. 6). Specifically, it was charged, petitioners (1) refused to promote or display goods of manufacturers who did not comply with petitioners' terms and conditions; (2) induced and coerced manufacturers to comply with petitioners' terms and conditions; (3) disseminated a blacklist of uncooperative manufacturers; (4) required written

[2] Many of the affiliated associations include among their membership persons who have previously been salesmen and later became sales managers or persons who were principals in manufacturing concerns. Some of these persons later became members of the Association by reason of the requirement in the Association's bylaws that members of affiliates must become Association members.

contracts between members and their manufacturers; (5) restricted members from changing affiliates; (6) required affiliates to fix nonconflicting trade show dates; (7) prevented one salesman member from soliciting a manufacturer represented by another salesman member; (8) prohibited members from showing merchandise when or where they desired; (9) restricted the number of lines an associate member could exhibit; and (10) restricted membership (App. 6–8).

In their answers, petitioners generally denied the allegations of the complaint, although they admitted that they had disseminated lists of uncooperative manufacturers, required members to enter into Association-approved contracts with manufacturers, and prevented expelled members from one affiliate from joining another (App. 11–21). Additionally, petitioners asserted that the Commission lacked jurisdiction over them because of the exemption of labor organizations from the prohibitions of the antitrust laws. They contended that all activities of the association were in furtherance of legitimate objectives to improve wages, hours and working conditions of its member salesmen (App. 11–12).

The Hearing Examiner ruled that the Association had engaged in the practices alleged and that they were unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act (App. 120–124). He found that the traveling-salesmen members of the Association and its affiliates who conducted trade shows were independent contractors and, as such, constituted a nonlabor group; that petitioners acted in combination

with said nonlabor group of independent contractors as well as other nonlabor groups, and that the challenged practices were carried out in connection with the commercial operation of the trade shows. Although the Examiner concluded that the National Labor Relations Board did not have exclusive primary jurisdiction to determine whether the Association was a labor organization, he concluded that for certain purposes the Association was a labor organization, but that in connection with the operation of trade shows it was a trade association (App. 120). The Examiner issued a proposed cease and desist order designed to prohibit the illegal commercial practices, while not enjoining certain specific activities consistent with petitioners' role as a labor organization (App. 118–119, 125–135).

Petitioners appealed the Examiner's decision to the Commission. They claimed that the practices found by the Examiner did not violate Section 5 of the Federal Trade Commission Act because they came within the labor exemption to the antitrust laws and were therefore beyond the Commission's jurisdiction (Pet. App. 2c). The Commission modified the Examiner's findings as to the jurisdictional role of the Board, but otherwise adopted his findings and conclusions (Pet. App. 10c). With respect to the labor-organization status of the Association, the Commission deferred to the 1969 NLRB decision in *Bambury Fashions, Inc.*, 179 NLRB 447. In that case, the National Labor Relations Board ("Board") determined that the Association was disqualified to act as a labor organization because its membership was composed primarily of traveling salesmen who were independent contractors; and that,

in conducting trade shows on behalf of these independent contractors, the Association was engaged in the business of selling apparel in direct competition with apparel manufacturers (App. 146–156).[3] In the Board's view, the Association's competitive interests raised the possibility that the organization might be operated for protecting its entrepreneurial interests and not for the benefit of the employees it purportedly was representing (App. 156). The Commission found that the Board's conclusions were fully supported by the Hearing Examiner's findings and concluded that, in the circumstances, the labor antitrust exemption was not available to the Association (Pet. App. 16c). Therefore the challenged practices constituted violations of Section 5 of the Federal Trade Commission Act (Pet. App. 16c).

A divided court of appeals affirmed. The court held that the labor exemption to the antitrust laws does not shield the Association's admitted anticompetitive conduct. It ruled that the labor exemption is not available to a labor organization which acts in an entrepreneurial capacity.[4] The court further concluded that the

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[3] The competition between manufacturers and the Association with respect to trade show activities is illustrated by the provisions of the Association standard contract. It provides that manufacturers are prohibited from engaging in showroom sales of their line in the same city in which a traveling salesman is exhibiting that line at a trade show. Another provision restricts manufacturers from using other methods of sale in the independent contractor's territory by requiring them to credit the salesmen for any sales by such alternatives (Pet. App. 14c).

[4] See *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 733. See also *Streiffer* v. *Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La).

Commission properly took into account the Board's decision in *Bambury Fashions, supra,* because the labor exemption does not apply to an organization that is disqualified from acting as a labor organization under the labor laws.[5]

**ARGUMENT**

This case presents no issue warranting further review. The Commission's decision rests upon factual findings supported by substantial evidence and the decision applies well-settled principles of labor and antitrust law. The court of appeals fully considered and properly rejected petitioners' contentions.

Contrary to petitioners' assertions (Pet. 9–15), there is no conflict between the decision below and this Court's decision in *National Labor Relations Board* v. *Cabot Carbon Co.,* 360 U.S. 203. That case held that the broad term "labor organization" is not synonymous with the more limited term "bargaining representative." *Id.* at 211. The Commission did not deny the Association the status of a "labor organization" because of its disqualification from certification as a bargaining representative by the Board. The substance of its decision was that an organization the Board held to be "disqualified from acting as a labor organization" (App. 156) because of its commercial operations, cannot claim the exemption granted labor organizations in the Norris-LaGuardia and Clayton Acts. This determination is fully in accord with precedents

[5] Since the majority based its determination on the finding that the Association is disqualified from acting as a labor organization, it did not determine the extent to which component members of the Association might constitute nonlabor groups.

of this Court which indicate that the labor exemption reflects a process of accommodation between the antitrust laws and the policy of the labor laws. *United States* v. *Hutcheson,* 312 U.S. 219; *Allen Bradley Co.* v. *Local Union #3,* 325 U.S. 797; *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S.. 676.

The availability of the labor exemption depends on a determination of three factors: (1) is the organization in question a "labor organization"?; (2) does the conduct challenged arise in the context of a "labor dispute"?; and (3) has there been a combination of labor and non-labor groups? Petitioner's claim founders on the threshold requirement.

In *Bambury Fashions, Inc.,* 179 NLRB 447 (App. 146–156), affirmed *sub nom. National Association of Women's & Children's Apparel Salesmen, Inc.* v. *National Labor Relations Board,* 465 F. 2d 662 (C.A.D.C.), the Labor Board found that the independent contractor salesmen "exercise substantial majority control over" the Association and that Association trade shows, operated for the benefit of the independent contractors, are in direct commercial competition with sales efforts of apparel manufacturers (App. 155). Even though the Association meets the statutory requirements of a labor organization, the Board concluded, it is "disqualified from acting as [a labor organization] * * *" (*ibid.*) because of the danger that it may be controlled "not for the benefit of [bargaining] unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining

table" (App. 156). Thus, as a result of that decision, the Association is not permitted to function as a labor organization.

The Commission, after conducting an independent proceeding concerning Association activities, properly gave substantial weight to the Board's determination. The policy behind the labor exemption from the antitrust laws requires that it apply only to bona fide labor organizations, *i.e.*, associations of employees qualified to act as such within the statutory requirements of the federal labor laws. The Commission found that the Association is essentially a trade association dominated by independent contractors (App. 120). Moreover, the Association deals collectively with members of the industry with whom those contractors compete. The Labor Board's decision in *Bambury,* which rested on similar findings, confirms that the Association is, therefore, not a bona fide labor organization. This removes its anticompetitive activities from the special dispensation accorded labor organizations by the Norris-LaGuardia and Clayton Acts. See *Jewel Tea, supra,* 381 at 733 (Goldberg, J., concurring).

Petitioner errs in contending that the decision of the court of appeals limits the labor antitrust exemption to organizations authorized to act in the capacity of a collective bargaining representative (Pet. 19). The decision makes clear that it is the Association's entrepreneurial role which destroys its claim to the labor exemption. *Jewel Tea, supra,* at 381 U.S. 689, 710; *American Federation of Musicians* v. *Carroll,* 391 U.S. 99.

Since the Association has a commercial interest in competition with any employer with whom it seeks to negotiate, it would serve the polices of neither the labor laws nor the antitrust laws to permit that organization to engage in anticompetitive conduct in the guise of a "labor organization." The labor exemption "is inapplicable where the union acts not as a union but as an entrepreneur." *Jewel Tea, supra,* at 733 (Goldberg, J., concurring); *Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F. Supp. 602 (E.D. La.). Cf. *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U.S. 94. Because the Association was found to be a direct competitor of apparel manufacturers (Pet. App. 11c), any attempt by it to impose specified labor standards on another competitor would fall outside the scope of protections granted by the Norris-LaGuardia and Clayton Acts. See *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 667, 668; *Allen Bradley Co., supra.*[6]

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[6] When this Court struck down the collective bargaining agreements in *Pennington, supra,* it also recognized that an agreement by a group of employers and a union that the unions will seek specified labor standards in negotiations with other employers contravenes both the purposes of the labor and antitrust laws.

"* * * [T]he employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest." (*Pennington, supra,* at 667.)

And, in relation to the antitrust laws, such agreements clearly contravene its express purposes:

"After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act

Finally, we note that prior to the Board's decision in *Bambury Fashions, supra,* the FTC hearing examiner independently concluded that the Association's commercial operations disqualified it from invoking the labor exemption. The Commission adopted this conclusion and the majority below recognized that the Examiner's finding is supported by substantial evidence (Pet. App. 11b, n. 10). *Colonial Stores, Inc.* v. *Federal Trade Commission,* 450 F. 2d 733, 739 (C.A. 5). Thus, even were petitioner considered a "labor organization", the labor exemption would not be available.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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according to their own choice and discretion that run counter to antitrust policy. See, *e.g., Associated Press* v. *United States,* 326 U.S. 1, 19; *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U.S. 457, 465; *Anderson* v. *Shipowners Assn.,* 272 U.S. 359, 364–365." (*Pennington, supra,* at 668–669.)

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